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Supreme Court of the United States

OCTOBER TERM, 1947

No. 170

THOMAS BULLITT DIXON,

Petitioner,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; PHILIPP, SAWYER, RICE & KENNEDY; JAMES J. KENNEDY, JR.; FISH, RICHARDSON & NEAVE; HENRY R. ASHTON; JOHN MCGLONE,

Respondents.

MEMORANDUM FOR RESPONDENTS PHILIPP, SAWYER, RICE AND KENNEDY AND JAMES J. KENNEDY

JAMES J. KENNEDY,
Pro se and Counsel for Respondents Philipp, Sawyer, Rice & Kennedy.

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MEMORANDUM FOR RESPONDENTS PHILIPP, SAWYER, RICE AND KENNEDY AND JAMES J. KENNEDY

We do not believe that any brief is needed to aid the Court in its consideration of the present petition. We will, however, answer petitioner's charges of fraud as concisely as possible.

The entire case is reviewed in the opinion of the District Court (R. P. 253, 274), and a full discussion of all the allegations made by plaintiff-petitioner would merely reproduce that opinion and the memoranda and affidavits printed in the record at pages 112-121; 199-218. Accordingly, the present memorandum will deal briefly only with those points stressed in the petitioner's present brief, for the Court's guidance in examining the record.

The Stipulation

(Pages 21, 22 and 29 of Petitioner's Brief)

This stipulation was necessary for the proof of plaintiff's case and did not tend to limit plaintiff's possible recovery as he now alleges (R. P. 115). That there was no concealment is clear from the record in the prior suit, the defendants therein having introduced proof of use in the fields which petitioner now says were concealed (Exhibit E in the prior suit, printed at page 251 of the record therein).

The So-Called Commercial Use

(Pages 24-27 of Petitioner's Brief)

There was no commercial use of the invention of the patent in suit but only some tests or demonstrations made in the early nineteen hundreds, followed by no further use of the invention (R. P. 203-204). No evidence of these demonstrations was needed to establish "operative utility" and proof of them would clearly have aided the defense in the prior suit, insofar as relevant at all (R. P. 204).

The Rehearing Point

(Pages 28, 29 of Petitioner's Brief)

The only ground asserted for asking rehearing in the prior suit is a misquotation in the trial Court's opinion (12 F. Supp. 996) appearing to attribute to the patent a statement by defendants' expert. This quotation:

> "operated by the motion of a beam of light or heat or radiant energy"

is little more than a paraphrase of the actual language of the patent recited earlier by the trial Court:

"whether the variation be due to action of light rays, heat rays or other forms of radiant energy".

Such a triviality furnished no basis for a rehearing.

Conclusion

The above matters have been selected for discussion, not because they possess any more substance than other matters alleged in the pleadings and passed on by the District Court, but merely because they are stressed in the petitioner's brief. They are, however, fairly typical of the circumstances from which petitioner asks this Court to infer fraud in the trial of his prior suit.

We believe it will be clear to this Court that petitioner's criticisms of his former attorneys are groundless and it is respectfully submitted that no circumstances have been adduced to support plaintiff's allegations of fraud or even to lend color to those allegations.

JAMES J. KENNEDY,
Pro se and Counsel for Respondents
Philipp, Sawyer, Rice & Kennedy.

New York, N. Y.
August 19, 1947.